

When is an activity considered nonmetallic mining?

Nonmetallic Mining Guidance

Title: Interpretation of the Definition of “Nonmetallic Mining”

Summary: The extraction of mineral aggregates or nonmetallic minerals for “sale or use by the operator” is defined as “nonmetallic mining” under Ch. NR 135, Wis. Adm. Code. There are cases where nonmetallic minerals are extracted for a purpose unrelated to mining. A regulatory authority (RA) may make a determination that the sale or use of material is incidental to the intended activity and that the activity is, therefore, not considered “nonmetallic mining” in accordance with this guidance.

Rules which this guidance interprets: Section NR 135.03(13), Wis. Adm. Code (definition of “nonmetallic mining”)

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Guidance Text:

Question: Section NR 135.03(13), Wis. Adm. Code, defines nonmetallic mining as, “Operations or activities at a nonmetallic mining site for the extraction from the earth of mineral aggregates or nonmetallic minerals for sale or use by the operator....” In cases where the material to be used or sold is generated incidentally to the primary purpose of the project, e.g. during the creation of a wetland or sedimentation basin, would the activity be considered “nonmetallic mining” subject to regulation under Ch. NR 135?

Answer: If excavated material is being sold or used by the operator, the presumption is that the activity is nonmetallic mining and regulated under Ch. NR 135, Wis. Adm. Code. However, the Department believes there are exceptions, including:

1. Where an activity meets the definition of nonmetallic mining but for which there is a specific exemption under s. NR 135.02(3), Wis. Adm. Code. The code lists specific activities including, for example, excavations for building construction, excavations or grading for domestic or farm use at the same residence or property, and excavations regulated under certain sections of Ch. 30, Stats., and Ch. NR 340, Wis. Adm. Code.
2. Where the regulatory authority determines that the project was primarily for a purpose unrelated to mining and that sale or use of the excavated material was only incidental to the primary purpose of the project. The regulatory authority could, in such a case, conclude that the activity did not meet the definition of nonmetallic mining and, therefore, was not subject to the reclamation rules.

When making a determination whether or not the material excavated is incidental to the proposed project or activity, the regulatory authority should consider the following questions:

- **What is the purpose or incentive for the project?** To not be considered “mining,” a regulatory authority must determine that a project is primarily for a purpose other than “nonmetallic mining” and that sale of excavated material will only be incidental to the primary purpose of the project. To support this, the applicant should provide clear evidence that the primary incentive for the project is unrelated to the benefits accruing to the operator from the sale or use of the excavated material.
- **Is the project of limited duration?** If the material in question is being generated as part of a one-time, short duration event related to another activity, it is more likely to be truly incidental to the project. An ongoing project that is active for a long period of time (i.e. several years) is more likely to be considered a “nonmetallic mine site”.
- **Is the material being generated as the result of a government sponsored, financed or supervised conservation program?** Generally, materials generated as the result of a government sponsored, funded or supervised conservation project would be considered incidental to the project’s purpose, especially if the project’s goal is habitat enhancement or restoration. Private conservation projects could also be considered as generating incidental materials provided the project is of limited duration and the value of the excavated materials is minor in comparison to the total cost of the project.
- **Is the material to be sold and, if so, what is the cost of the project in comparison to the revenue generated by the sale of the excavated material?** If excavated material is being sold, the presumption is that the activity is nonmetallic mining and regulated under Ch. NR 135, Wis. Adm. Code, unless the RA makes a determination that the materials generated were clearly incidental to the project objective. If the activity were intended primarily as wetland creation rather than mining, for example, then the cost of creating the wetland should exceed the incidental revenue from sale of material. If the revenue exceeds the cost of creating the wetland, then the activity would likely fail to meet the test of being incidental to the project.

The considerations above are not intended to be inclusive and any determination would have to be made by the RA on a case-by-case basis.

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